IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 6105 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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SANJAYSING TEJABHADURSING THAKUR

Versus

COMMISSIONER OF POLICE

Appearance:

1. Special Civil Application No. 6105 of 2001

MR AM PAREKH for Petitioner No. 1

RULE SERVED for Respondent No. 1,2,3

MR K.T.DAVE, AGP for Respondent No. 2

CORAM : MR.JUSTICE A.M.KAPADIA

Date of decision: 18/09/2001

ORAL JUDGEMENT

1. In exercise of powers under Section 3(2) of the Gujarat Prevention of Anti Social Activities Act, 1985,

('the Act' for short), Commissioner of Police, Ahmedabad City, Ahmedabad, vide order dated December 29, 2000 (Annexure-A to the petition) detained the petitioner/detenu.

2. The averments made in the petition and the grounds of detention manifest that the detaining authority has considered the petitioner as a prohibition bootlegger within the meaning of Section 2(b) of the Act as one case under Prohibition Act is registered against him which is pending for trial and the statements of two witnesses are recorded. According to the detaining authority activities of the petitioner are prejudicial to the maintenance of the public order and, therefore, powers under Section 9(2) of the Act were exercised by the detaining authority.

3. By filing this petition under Article 226 of the Constitution, petitioner has assailed the order of detention on various grounds and prayed to issue writ of habeas corpus or any other appropriate writ or order quashing and setting aside the impugned order of detention and further prayed to set him at liberty forthwith.

4. The petitioner has challenged the detention order on various grounds. However, Mr. A.M.Parikh, learned advocate for the petitioner has restricted his arguments to the effect that subjective satisfaction recorded by the detaining authority under Section 9(2) of the Act cannot be considered as genuine. In order to substantiate his submissions, he placed reliance on the statements of two witnesses which were recorded on December 27, 2000 and verified by the detaining authority on December 28, 2000 and immediately on the next date i.e. on December 29, 2000 order of detention came to be passed and therefore, detaining authority had no sufficient time to examine the witnesses. Besides this, detaining authority has also observed that at the relevant point of time the petitioner was in police remand and after remand period is over, petitioner would be enlarged on bail and according to the learned counsel, reasoning that there is "likelihood to be released on bail" is different from "likelihood of his moving an application for bail" and therefore, on this ground also subjective satisfaction recorded by the detaining authority cannot be considered as genuine. On the aforesaid grounds it is urged by the learned advocate for the petitioner that the order of detention is vulnerable and bad in the eyes of law and, therefore, the petition deserves to be allowed by quashing and setting aside the

order of detention and setting the petitioner at liberty. Mr. Parikh has further contended that Special Civil Application No. 6006 of 2001 filed by the co-detenu before this Court has been allowed by this Court (Coram: A.M.Kapadia, J) vide order dated September 13, 2001 by quashing and setting aside the order of detention dated December 29, 2001 and setting the petitioner at liberty. He, therefore prayed that this petition may also be allowed.

5. Mr. K.T.Dave, learned AGP has opposed this petition. However, he does not dispute the factual aspects with regard to the date on which statements of witnesses were recorded, verified and order of detention came to be passed. He also does not dispute the fact that the detaining authority has considered that at the relevant point of time the petitioner was in police remand and therefore after the said period was over, petitioner would apply for bail and he may get bail from the competent Court and thereafter again he would indulge in similar activities. He contended that detaining authority has taken into consideration the statements of two witnesses and came to the conclusion that the statements of witnesses are correct and genuine and has exercised power under Section 9(2) of the Act. Therefore, privilege is rightly claimed. According to him there is no substance in the petition which is liable to be rejected.

6. A similar question arose before the Division Bench of this Court in the case of KALIDAS C KAHAR V. STATE 1993 (2) GLR 1659 in which proposal was made on October 16, 1992 and detention order was passed on October 17, 1992 and thereafter it was held to be a wrong exercise of power under Section 9(2) which has affected the detenu's right of making an effective representation as enshrined under Article 22(5) of the Constitution and therefore, the detention order was quashed.

7. Applying the aforesaid principles laid down by this Court to the facts of the present case, it is clear that the present case is identical to the case referred to above and here also statements of two witnesses were recorded on December 27, 2000 and verified by the detaining authority on December 28, 2000 and immediately on the next day i.e. on December 29, 2000, order of detention came to be passed. Therefore, order of detention stands vitiated.

8. So far as the observations made with respect to one case registered against the petitioner under

Prohibition Act, detaining authority has considered the aspect of releasing the petitioner on bail after remand period is over. There is a difference between "likelihood to be released on bail" and likelihood of his moving an application for bail". In this connection it would be appropriate to refer to the judgement of the Supreme Court in the case of AMRITLAL V. UNION GOVERNMENT- 2000 AIR SCW 4203 wherein it is held that there must be cogent material before the officer passing the detention order that the detenu is likely to be released on bail. The inference must be drawn from the available material on record and must not be the ipse dixit of the officer passing the order of detention. Likelihood of detenu's moving an application for bail is not a cogent material and detention order based on such material is liable to be quashed. The reasoning that there is "likelihood to be released on bail" is different from "likelihood of his moving an application for bail".

9. Applying the aforesaid principles laid down by this Court and also the Supreme Court to the facts of the present case, in the instant case also the detaining authority has considered only the aspect that the petitioner may be released on bail and thereafter also he would indulge in similar activity, is not well-founded as there is a distinction between "likelihood to be released on bail" and "likelihood of his moving an application for bail". Therefore, order of detention stands vitiated and the petition deserves to be allowed on this ground alone.

10. For the foregoing reasons, petition succeeds and is accordingly allowed. The impugned order of detention dated December 29, 2000 is hereby quashed and set aside. The petitioner/detenu is ordered to be set at liberty forthwith if not required in connection with any other case. Rule is made absolute. No order as to costs. Direct service is permitted.

(A.M.Kapadia, J)

Jayanti*